This document is scheduled to be published in the
Federal Register on 03/31/2023 and available online at
federalregister.gov/d/2023-06719, and on **govinfo.gov**

4810-AM-P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

[Docket No. CFPB-2022-0070]

Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Preemption determination.

SUMMARY: After considering public comments, the Consumer Financial Protection Bureau (CFPB) has determined that commercial financing disclosure laws in California, New York, Utah, and Virginia are not preempted by the Truth in Lending Act.

DATES: This determination is issued on [**INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

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SUPPLEMENTARY INFORMATION:

I. Overview of this Proceeding

The Truth in Lending Act (TILA) ensures that key information about consumer credit transactions is disclosed to consumers. TILA preempts State disclosure laws only if they are "inconsistent" with it. The CFPB is authorized to determine whether there is an inconsistency.[1]

In recent years, New York, California, Utah, and Virginia have enacted laws that require disclosures for commercial financing transactions to businesses, which do not receive TILA disclosures in those transactions. The CFPB received a request from a trade association (the

[1] TILA section 111(a), 15 U.S.C. 1610(a).

requesting party) that it determine that TILA preempts New York's commercial financing disclosure law. In response, the CFPB published for public comment a notification of intent to make a preemption determination. In the notification of intent, the CFPB considered the requesting party's initial arguments and preliminarily found that New York's law was not preempted. On the CFPB's own motion, the CFPB also provided notice that it may make parallel findings regarding the California, Utah, and Virginia laws.

The CFPB received fifteen comments on the notification of intent. The Attorney General of California, two trade associations, a lender to small businesses, a group of consumer advocacy organizations, and a group of lenders, investors, and small business advocates all supported the CFPB's notification of intent. On the other hand, the requesting party, several other trade associations, and a different lender to small businesses argued that some or all of the four States' laws are preempted.[2]

After analyzing the comments, the CFPB has concluded that the State commercial financing disclosure laws of California, New York, Utah, and Virginia are not preempted by TILA. Congress adopted a narrow standard for TILA preemption that displaces State law only in the case of "inconsistency." This means that States have broad authority to establish their own protections for their residents, both within and outside the scope of TILA. As relevant here, commercial financing transactions to businesses—and any disclosures associated with such transactions—are beyond the scope of TILA's statutory purposes, which concern consumer credit.

II. General Background on the Truth in Lending Act

Congress enacted TILA in 1968 because it found that "competition among the various financial institutions and other firms engaged in the extension of consumer credit would be

[2] The notification of intent is available at 87 FR 76551 (Dec. 15, 2022). The original request is available at https://www.regulations.gov/document/CFPB-2022-0070-0002. The comments on the notification of intent are available at https://www.regulations.gov/document/CFPB-2022-0070-0004/comment.

strengthened by the informed use of credit."[3] As relevant here, TILA's stated purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[4] TILA requires creditors to use specified formulas to determine credit costs and to provide cost disclosures, including the "finance charge" and "annual percentage rate" (APR), to consumers before consummation of "consumer credit" transactions. Consumer credit is credit that is offered or extended "primarily for personal, family, or household purposes."[5] Conversely, TILA expressly does not apply to "credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes."[6]

In 1968, Congress authorized the Board of Governors of the Federal Reserve System (Board) to issue regulations under TILA.[7] In 2010, Congress transferred the "consumer financial protection functions" of the Board to the CFPB as an independent bureau in the Federal Reserve System.[8] The CFPB's Regulation Z, originally based on the Board's Regulation Z, implements TILA.[9]

III. Standard for Preemption under the Truth in Lending Act

A. TILA

According to TILA section 111(a)(1), TILA does not "annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except

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[3] TILA section 102(a), 15 U.S.C. 1601(a).
[4] *Id*.
[5] TILA section 103(i), 15 U.S.C. 1602(i); 12 CFR 1026.2(a)(12).
[6] TILA section 104(1), 15 U.S.C. 1603(1). There is a limited exception related to certain requirements for certain credit cards that is not applicable here. TILA section 135, 15 U.S.C. 1645; 12 CFR 1026.12.
[7] Pub. L. 90-321, title I, sec. 105, 82 Stat. 146, 148.
[8] *See* sections 1011(a) and 1061(b)(1) of the Consumer Financial Protection Act of 2010, 12 U.S.C. 5491(a), 5581(b)(1). Additionally, Congress has provided that "the deference that a court affords to the Bureau with respect to a determination made by the Bureau relating to the meaning or interpretation of any provision of" TILA or its implementing regulations, aside from certain provisions related to property appraisals, "shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of" TILA and its implementing regulations. TILA sections 103(z), 105(h), 15 U.S.C. 1602(z), 1604(h).
[9] 12 CFR part 1026.

to the extent that those laws are inconsistent with the provisions of [TILA], and then only to the extent of the inconsistency."[10]

As explained by TILA's legislative history, this provision "sets forth the basic policy that the Federal statute does not preempt State legislation."[11]

B. Regulation Z

Section 1026.28(a)(1) of the CFPB's Regulation Z implements the inconsistency standard from TILA section 111(a)(1).[12] It is based on an identical provision in the Board's Regulation Z.[13] There are three key sentences in the provision for purposes of this determination.

The first sentence, tracking TILA section 111(a)(1), provides that "State law requirements" that are "inconsistent" with TILA and Regulation Z are preempted.[14]

The second sentence provides, as an example, that a "State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law."[15] The term "creditor" is a defined term in TILA and Regulation Z, referring to a person extending "consumer credit."[16]

The third sentence, in turn, provides examples of "contradictory" disclosures or actions by a creditor: "A State law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the Federal law, or if it requires the use of a term different from that required in the Federal law to describe the same item."[17]

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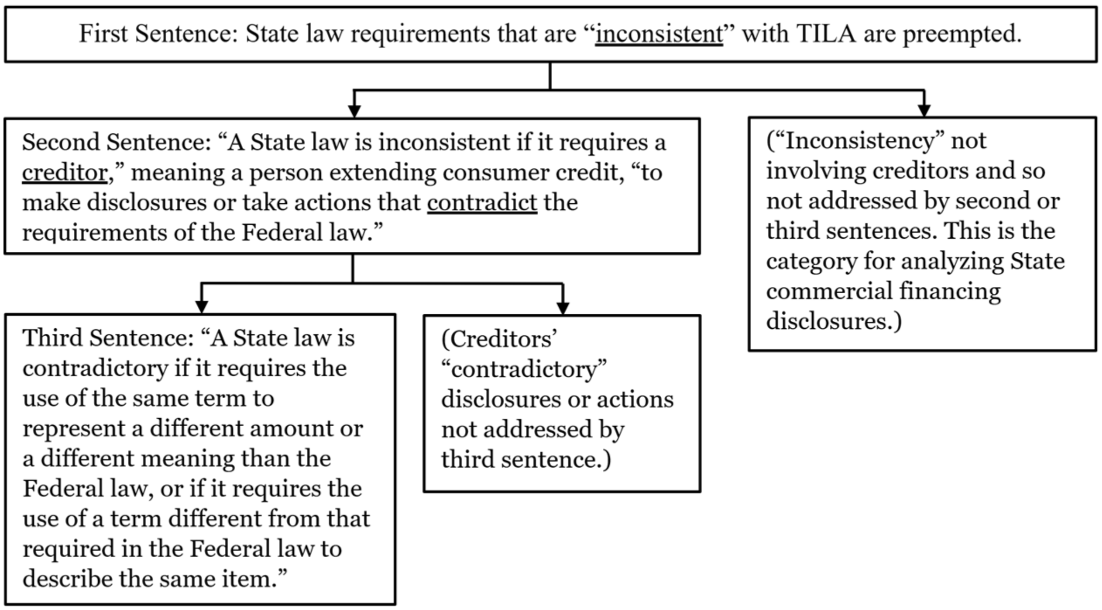
[10] 15 U.S.C. 1610(a)(1). This authority pertains to chapters 1, 2, and 3 of TILA, which are codified as parts A, B, and C of 12 U.S.C. ch. 41, subch. I. This determination refers to chapters 1, 2, and 3 of TILA as "TILA" for convenience. Chapters 4 and 5 of TILA, which are codified as parts D and E and known as the Fair Credit Billing Act and Consumer Leasing Act, respectively, are not implicated here and have separate preemption provisions.
[11] S. Rep. No. 90-392, at 20 (1967); *accord* H.R. Rep. No. 90-1040, at 30 (1967).
[12] 12 CFR 1026.28(a)(1).
[13] 76 FR 79768, 79806-07 (Dec. 22, 2011); 46 FR 20848, 20906 (Apr. 7, 1981) (codified at 12 CFR 226.28(a)(1)).
[14] 12 CFR 1026.28(a)(1) (first sentence). There are exceptions that are not relevant here. *Id.*
[15] 12 CFR 1026.28(a)(1) (second sentence).
[16] 12 CFR 1026.2(a)(17)(i). There are other features of the definition of "creditor" that are not relevant here. *Id.*
[17] 12 CFR 1026.28(a)(1) (third sentence).

Based on Board precedents, the examples in the third sentence are only a subset of the second sentence, which in turn is only a subset of the first sentence.[18] The structure of § 1026.28(a)(1) is illustrated by Figure 1:

Figure 1: § 1026.28(a)(1) of Regulation Z



Because none of the four State commercial financing disclosure laws involve a TILA "creditor," i.e., a person extending consumer credit, the second and third sentences are not applicable to those laws, and only the first sentence is potentially applicable.

The requesting party submitted a comment arguing that the third sentence means that State laws are automatically preempted whenever they use the terms finance charge and APR to represent different amounts from Regulation Z. But this comment reads the third sentence out of its context. The third sentence provides examples of the second sentence's discussion of

[18] Put another way, when the second and third sentences use the word "if," they do *not* mean "if and only if." (Of course, use of language depends on context, and there are other statutory and regulatory contexts where "if" does imply "if and only if.") An example where the only the first sentence was applicable (but not the second or third), because there were no disclosures or actions by a "creditor"—only by certain non-creditor loan brokers—was 53 FR 3332, 3332-33 (Feb. 5, 1988) (Indiana). Regarding that 1988 Indiana determination, *see also* note 54 below. In 1983, the Board that explained that sometimes both the first and second sentences are applicable (but not the third). That is when the State law does require disclosures or actions by a "creditor," but the law does not "deal with disclosures of terms and amounts." 48 FR 4454 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina).

"contradictory" disclosures or actions by "creditors." Conduct by non-creditors is outside its scope and has to be analyzed using the overall inconsistency standard in the first sentence.[19]

The reading of the third sentence proffered by the requesting party would result in implausibly sweeping preemption. Although the requesting party focuses its argument on the finance charge and APR, the reading would logically prevent State disclosures—regardless of topic—from using other Regulation Z disclosure terms such as "File #," "Closing Date," "Deposit," or "County Taxes," without aligning with technical Regulation Z definitions that may have no connection with the topic of the State disclosures.[20] Accordingly, the third sentence does not govern non-TILA-creditor contexts.

C. Approach When Evaluating Inconsistency

The notification of intent stated that the CFPB was considering whether it should clarify how the CFPB articulates the standard for TILA preemption and requested comment on that issue. The Attorney General of California commented that the standard should be understood to align with conflict preemption.

The CFPB agrees that TILA's and Regulation Z's inconsistency standard aligns with conflict preemption. In conflict preemption, there is a conflict either when it is "*impossible*" to comply with both the Federal law and the State law (the impossibility prong) or when the State law "stands as an *obstacle* to the accomplishment and execution of the full purposes" of the Federal law (the obstacle prong).[21] There is preemption under the obstacle prong when "the

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[19] The requesting party's comment also cites Regulation Z commentary discussing the third sentence of 12 CFR 1026.28(a)(1). The commentary provides two specific examples of types of State laws that would be preempted under the third sentence, but these commentary examples do not affect the present analysis of the regulation. The first example in the commentary explains that the third sentence's bar on a State law that "requires the use of the same term to represent a different amount or a different meaning" would include, as an example, a "State law that requires use of the term finance charge, but defines the term to include fees that the Federal law excludes, or to exclude fees the Federal law includes." 12 CFR part 1026, supp. I, comment 28(a)-2.i. The second example explains that the third sentence's bar on a State law that "requires the use of a term different from that required in the Federal law to describe the same item" would include, as an example, a "State law that requires a label such as nominal annual interest rate to be used for what the Federal law calls the annual percentage rate." *Id.*, comment 28(a)-2.ii. The commentary, like the language in the third sentence it illustrates, is limited by its context to disclosures provided by TILA creditors.

[20] *Id.*; 12 CFR 1026.38 (Regulation Z closing disclosure for mortgage loans).

[21] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-3 (2000) (emphasis added).

purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect."[22]

The Board's precedents align with conflict preemption. With respect to the impossibility prong, the Board at times assessed whether "a creditor can comply with both the State and Federal provisions."[23] However, State laws rarely or never make delivery of TILA disclosures impossible, so impossibility does not figure prominently in the Board's precedents.

The Board's consideration of preemption instead typically focused on the obstacle prong. When determining whether disclosures or actions by a creditor contradicted TILA, the Board held that a State law is preempted when "it significantly impedes the operation of the Federal law or interferes with the purposes of the Federal statute."[24] When evaluating whether a State law regulating non-creditors was inconsistent with TILA, the Board used similar wording, considering whether the State law was "inconsistent with the purpose of the Federal law" and would "undermine the intent of the Federal scheme."[25] The CFPB understands these to be applications of the obstacle prong.

The conclusion that inconsistency under TILA aligns with conflict preemption is reinforced by case law. The District of Columbia Circuit has applied a conflict-preemption analysis when considering whether TILA preempted State law.[26] The Ninth Circuit has observed, in the context of other statutes that use an "inconsistency" test for preemption, that "when the preemption clause uses the term 'inconsistent,'" the analysis under the preemption clause and the analysis under conflict preemption "effectively collapse into one."[27]

In order to determine whether State law "stands as an obstacle" to TILA's purposes, it is necessary to carefully consider those statutory purposes. Congress has delineated TILA's main

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[22] *Id.* at 373.
[23] 56 FR 3005, 3006 (Jan. 28, 1991) (New Mexico).
[24] *E.g.*, 48 FR 4454 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina).
[25] 53 FR 3332, 3333 (Feb. 5, 1988) (Indiana).
[26] *Williams v. First Gov't Mortg. & Invs. Corp.*, 176 F.3d 497, 500 (D.C. Cir. 1999) (considering whether State law "would defeat TILA's purposes" or whether "joint applicability of the two statutes would subject [the regulated party] to conflicting obligations").
[27] *Jones v. Google LLC*, 56 F.4th 735, 741 (9th Cir. 2022).

purposes in purpose provisions. The relevant purpose provision in most disclosure contexts, including the present one, is section 102(a): "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[28] Thus, in order to be preempted on this basis, a State law has to frustrate the meaningful disclosure of credit terms to consumers that TILA and Regulation Z provide.

The group of consumer advocacy organizations argued in a comment that preemption under TILA should not be based on conflict with the purposes of TILA. The organizations expressed concern about the vague way in which purposes could conceivably be articulated to preempt State law.

The CFPB notes that evaluating whether or not State law stands as an obstacle to a statute's purposes is a well-established prong of conflict preemption. The CFPB believes that the purposes of TILA, when carefully considered, provide appropriate guideposts for a narrow preemption standard that respects rather than undermines State law. When construing TILA's purposes, it is important to bear in mind that Congress's "basic policy" in drafting TILA was "that the Federal statute does not preempt State legislation."[29]

D. States' Ability to Prescribe Additional Disclosures and Protections

The Attorney General of California requested that the CFPB emphasize the statement in the Regulation Z commentary that: "Generally, State law requirements that call for the disclosure of items of information not covered by the Federal law, or that require more detailed disclosures," are not preempted.[30] The CFPB agrees that these are examples of State disclosure laws that are generally not inconsistent with TILA or Regulation Z and so are not preempted.

[28] 15 U.S.C. 1601(a); *see also*, *e.g.*, *id.* ("to protect the consumer against inaccurate and unfair credit billing and credit card practices"); 15 U.S.C. 1639b(a)(2) (purposes related to residential mortgage loan origination).
[29] S. Rep. No. 90-392, at 20 (1967); *accord* H.R. Rep. No. 90-1040, at 30 (1967).
[30] 12 CFR part 1026, supplement I, comment 28(a)-3.

Relatedly, the group of consumer advocacy organizations asked the CFPB to note that TILA does not prevent States from affording greater protections to consumers. The CFPB agrees that, in the words of the District of Columbia Circuit: "Nothing in TILA or its legislative history suggests that Congress intended the Act's disclosure regime to provide the maximum protection to which borrowers are entitled nationwide; States remain free to impose greater protections for borrowers."[31]

E. Limited Extent of Preemptive Effect

TILA section 111(a)(1) provides that, in a scenario where there is an inconsistency, State law is preempted "*only to the extent* of the inconsistency." The Attorney General of California requested that the CFPB emphasize the principle articulated by the Board that "preemption occurs only in those transactions in which an actual inconsistency exists between the State law and the Federal law."[32] The CFPB agrees. The Board's approach honors TILA section 111(a)(1), which intrudes on State law only so far as is necessary to prevent inconsistency with TILA. For example, if an aspect of a State disclosure form would be inconsistent with TILA in some transactions, the State law is only preempted as applied to those transactions, and even in those transactions only the relevant aspect of the State disclosure form is preempted.[33]

[31] *Williams v. First Gov't Mortg. & Invs. Corp.*, 176 F.3d 497, 500 (D.C. Cir. 1999).
[32] 48 FR 4454, 4455 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina).
[33] *E.g.*, *id.* at 4455-57.

IV. Legal Authority

After establishing the inconsistency standard discussed above, TILA section 111(a)(1) provides that "the Bureau shall determine whether any such inconsistency exists," upon the Bureau's own motion or upon the request of any creditor, State, or other interested party.[34]

Congress added the authority for preemption determinations to section 111(a)(1) in 1980.[35] According to the legislative history, Congress was concerned about "current ambiguities" regarding the interaction of TILA and State laws, which created uncertainty for creditors seeking to comply, but also wanted to maintain "deference to the laws of the States."[36] Congress retained the existing inconsistency standard but conferred authority on the Board, and later the CFPB, to determine whether State laws are inconsistent.[37]

In addition to the CFPB's authority under TILA, section 554(e) of the Administrative Procedure Act authorizes any agency, in its sound discretion, to issue a declaratory order to terminate a controversy or remove uncertainty.[38] As the notification of intent explained, section 554(e) of the Administrative Procedure Act provides an additional, independent source of authority for this proceeding. Agencies have long used declaratory orders to address whether or not a law that they administer preempts a State law.[39]

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[34] 15 U.S.C. 1610(a)(1). Additionally, if the Bureau determines that a State-required disclosure is inconsistent, creditors located in that State may not make disclosures using the inconsistent term or form, and they incur no liability under the law of that State for failure to use such term or form, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason. *Id.* The CFPB's procedures for TILA preemption determinations are set out in Regulation Z, 12 CFR part 1026, appendix A.
[35] Truth in Lending Simplification and Reform Act of 1980, Pub. L. 96-221, title VI, sec. 609, 94 Stat. 163, 173.
[36] S. Rep. No. 96-73, at 14 (1979); *cf.* H.R. Conf. Rep. No. 96-842, at 80-81 (1980) (accepting Senate version). At the same time, Congress amended TILA to authorize the Board to make a "substantially the same in meaning" determination, which is distinct from a preemption determination and not at issue in this proceeding, as explained in the discussion of Virginia below.
[37] Although the requesting party requested this preemption determination, it responded to the notification of intent with a comment questioning the CFPB's authority to determine that State commercial financing disclosure laws are not preempted. According to the comment, if TILA does not preempt the four States' laws, as the CFPB's preliminarily determined, then the CFPB's authority to make preemption determinations should similarly not extend to these laws. However, TILA authorizes the CFPB to determine "whether" there is an "inconsistency," which necessarily includes the authority to reach the conclusion that there is no inconsistency. Moreover, the comment does not make any arguments challenging the CFPB's independent authority under section 554(e) of the Administrative Procedure Act, discussed in the notification of intent and also in the paragraph below.
[38] 5 U.S.C. 554(e).
[39] *E.g.*, *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984).

Although not required, the CFPB consulted the Board, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, and Office of the Comptroller of the Currency as part of its deliberative process.

V. California and New York

This part V discusses the California Commercial Financing Disclosures Law[40] and New York Commercial Finance Disclosure Law[41] together, as they are the most similar of the four State laws at issue in this proceeding.

A. Provisions of the California and New York Laws

Both the California and New York laws require "providers" to issue disclosures before consummation of certain commercial financing transactions, "intended by the recipient for use primarily for *other than* personal, family, or household purposes" (California) or "the proceeds of which the recipient does *not* intend to use primarily for personal, family, or household purposes" (New York).[42] These contrast with the relevant TILA criterion for consumer credit, which is "primarily for personal, family, or household purposes."[43] Accordingly, there was consensus among commenters that TILA disclosures, on the one hand, and California or New York disclosures, on the other, would not both be required in the context of any single transaction.

The California and New York disclosures include a "finance charge" and "annual percentage rate" (APR). These amounts are calculated by reference to the formulas that would hypothetically be used under the CFPB's Regulation Z in order to calculate the finance charge and APR, as if the transactions were consumer credit transactions, with certain specifications added by California and New York.[44] There was disagreement among commenters about

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[40] Cal. Fin. Code secs. 22800 to 22805; *see also* Cal. Code Regs. tit. 10, ch. 3, subch. 3.
[41] N.Y. Fin. Serv. Law secs. 801 to 812; *see also* N.Y. Comp. Codes R. & Regs., tit. 23, part 600.
[42] Cal. Fin. Code sec. 2280(d) (emphasis added); N.Y. Fin. Serv. Law sec. 801(b) (emphasis added).
[43] 15 U.S.C. 1602(i).
[44] Cal. Code Regs. tit. 10, secs. 940, 943; N.Y. Fin. Serv. Law secs. 801(e), 803-807; N.Y. Comp. Codes R. & Regs., tit. 23, secs. 600.2, 600.3. The California and New York disclosures use an "estimated" finance charge or APR in some circumstances, but any difference between estimated and non-estimated amounts does not affect the CFPB's

whether California's and New York's respective specifications result in different finance charges and APRs than would be generated under Regulation Z if it were hypothetically applicable, or whether they should instead be viewed as tailoring the finance charge and APR to the structures of certain types of commercial financing arrangements that are not shared by consumer credit transactions. For reasons discussed below, it is not necessary for the CFPB to resolve that specific debate.

B. Discussion

After considering the comments, the CFPB concludes that the California or New York laws are not inconsistent with TILA and so are not preempted. No commenter has suggested that compliance with these State laws as well as with TILA and Regulation Z is "impossible."[45] The CFPB also does not believe that these State laws stand "as an obstacle to the accomplishment or execution" of TILA's purposes.[46] As discussed above, the TILA purpose that is relevant here is "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[47] TILA achieves this purpose by requiring disclosures for consumer credit. Consumers applying for consumer credit will continue to receive only TILA disclosures, which will assure meaningful disclosure of credit terms and allow consumers to compare the terms of consumer credit products, including their finance charges and APRs.[48]

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analysis below. *Cf.* 12 CFR 1026.5(c), 1025.17(c)(2) (generally allowing use of estimates for Regulation Z disclosures when information is unavailable).

[45] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

[46] *Id*. The CFPB would reach the same conclusion however this concept is expressed, whether as "significantly impedes the operation of the Federal law or interferes with the purposes of the Federal statute," *e.g.*, 48 FR 4454 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina), or "inconsistent with the purpose of the Federal law," or "undermin[ing] the intent of the Federal scheme," 53 FR 3332, 3333 (Feb. 5, 1988) (Indiana).

[47] TILA section 102(a), 15 U.S.C. 1601(a).

[48] A comment by a lender cited a statement in a 1982 preliminary determination, not ultimately reflected in the final determination, that "State provisions on disclosure of the cost of credit, analogous to the finance charge or annual percentage rate disclosures under Regulation Z, will be reviewed more strictly," because "these disclosures are particularly significant." 47 FR 16201, 16202 (Apr. 15, 1982). This statement simply reflects the fact that the finance charge and APR are important disclosures in the context of consumer credit transactions, and it does not advance the analysis here.

Businesses' understanding of credit available to them for business purposes is an important policy issue, but it is not a purpose of TILA and has been left to the States to address. As TILA's legislative history explains, Congress decided when enacting TILA in 1968 not to focus on lending to businesses: "By limiting the bill to the field of consumer credit, the committee believes it is providing disclosure requirements in the area where it is most essential."[49] Commenters advocating for preemption had a number of complaints about how businesses might be confused by the California and New York disclosures. However, these concerns about the merits of the State laws are properly addressed to State legislators or regulators. It is not appropriate to use TILA preemption to override States' judgments regarding how best to disclose information to businesses, which is not part of TILA's purposes.

Commenters advocating preemption have not shown that consumers—when shopping for credit that they intend to use primarily for personal, family, or household purposes—would somehow be prevented from understanding the terms of credit available to them for those purposes, by State disclosures provided in different (business-purpose) transactions. The CFPB notes that Regulation Z places the responsibility for ascertaining the borrower's intended purpose on the would-be creditor.[50] In any situation where a potential borrower is shopping for credit primarily for personal, family, or household purposes, the borrower would receive the Federal TILA disclosures for all potential transactions for those purposes—not the California or New York disclosures.[51]

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[49] S. Rep. No. 90-392, at 7 (1967).

[50] 12 CFR part 1026, supplement I, comment 3(a)-1 ("A creditor must determine in each case if the transaction is primarily for an exempt purpose.").

[51] *Id.* Relatedly, some commenters advocating preemption asserted that consumers who are also small businesspeople and receive the California or New York disclosures when applying for commercial financing will, in their personal lives, distrust the TILA finance charge and APR because they do not have consistent meanings across Federal and State law. However, these comments did not offer any evidence or other support for the assumption that these individuals would react to differences between the State commercial financing version and TILA consumer credit version with distrust of the TILA version, rather than an understanding that different calculations may be appropriate in the context of different types of transaction. The CFPB notes that within TILA and Regulation Z there can be significant differences in how the finance charge is calculated depending on the type of consumer credit transaction, but the CFPB is not aware of this causing distrust by consumers. As one illustration, *compare* 15 U.S.C. 1605(a)(4); 12 CFR 1026.4(b)(4) (credit report fees included in finance charge for most consumer credit products) *with* 15 U.S.C. 1605(e)(6); 12 CFR 1026.4(c)(7)(iii) (credit report fees generally excluded from finance

TILA coverage depends on the primary purpose, so it is possible for a borrower to use the proceeds from a credit transaction primarily for business purposes but also to a lesser degree for personal purposes, in which case TILA disclosures would not be required. As noted above, TILA's disclosure regime concerned "the area where it is most essential," namely "consumer credit," which is an expansive category but subject to the primary-purpose standard.[52] Congress could have required, but did not require, TILA disclosures whenever any minor portion of primarily-business credit might be used for a personal purpose. Given that Congress did not consider addressing those transactions to be necessary in order to achieve its purpose of ensuring that consumer credit shopping is informed, such transactions should not drive an assessment of whether State disclosure regimes interfere with Congress's purposes.

The requesting party submitted a comment likening the California and New York laws to an Indiana law that the Board determined was preempted in 1988, but they are quite different.[53] The Indiana law required finance charge and APR disclosures in consumer credit transactions, with amounts that differed from TILA disclosures provided in the same transactions.[54] In the Board's words, the Indiana law would "undermine the intent of the Federal scheme by confusing consumers who will receive two different sets of disclosures—both purporting to describe the cost of credit—that contain different figures described by the same terminology."[55] This type of concern is inapplicable in California and New York, where the consumer will receive only the Federal TILA disclosure forms when shopping for consumer credit.

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charge in transactions secured by real property). Moreover, even assuming this scenario were to occur, the CFPB would not consider the issue to be so significant as to interfere with TILA's purpose of enabling consumers to compare consumer credit products.

[52] S. Rep. No. 90-392, at 7 (1967).

[53] 53 FR 3332, 3332-33 (Feb. 5, 1988) (Indiana).

[54] Although the Indiana law did not impose requirements on creditors, it required loan brokers to disclose a finance charge and APR to consumers, which differed from the finance charge and APR that TILA required creditors to provide to the very same consumers in the very same consumer credit transactions. *Id.* Because the Indiana law regulated loan brokers rather than creditors, only the first sentence of § 1026.28(a)(1) (and not the second or third sentence) governed. But whether it was the loan broker or the creditor that provided the Indiana disclosure made little difference, and so even though the third sentence did not apply, the situation was analogous to the third sentence's bar on creditors providing State disclosures with differing amounts that contradict TILA disclosures.

[55] *Id.* at 3333.

Aside from State disclosure forms provided to borrowers individually, some comments asserted that advertisements for commercial financing that include APRs calculated using California or New York's formulas could cause confusion. As background, under Regulation Z there is a requirement that some advertisements for consumer credit transactions include the TILA APR.[56] However, there is no parallel requirement under the California or New York commercial financing laws that commercial lenders include any APR-related statements in advertisements, so the premise of these comments appears mistaken. To the extent commercial lenders might conceivably choose to add the California or New York APRs to advertisements, that is not a requirement of those laws and not a basis to declare those laws' disclosure requirements to be inconsistent with TILA. As the first sentence of § 1026.28(a)(1) states, only "State law requirements" that are inconsistent are preempted, not wholly voluntary practices that are independent of requirements.[57] In any event, even assuming such voluntary practices could somehow support preemption, commenters have not provided any evidence that commercial lenders have an incentive to use the California or New York APRs in advertisements, which the same set of commenters assert tend to overstate the cost of credit.[58]

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[56] 12 CFR 1026.16, 1026.24.

[57] The Board at times considered how creditors were likely to *comply with* a State law requirement as context in considering whether the requirement is preempted. In particular, when the Board was faced with a State law that used certain terminology to describe an amount in a disclosure form, but did not expressly mandate that creditors use the law's terminology when labeling the amount in the disclosure form, the Board operated on the assumption that creditors would comply by using the State law's terminology in their disclosure forms. 48 FR 4454, 4455 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina). For instance, if Missouri law required creditors to disclose what the text of the Missouri law called the "principal balance," the Board assumed that creditors would go about complying by using the words "principal balance" in their disclosure forms, and the Board would not speculate about whether some synonym might also comply with the Missouri law. *Id.* at 4455, 4456-57. But here, whether creditors choose to add the California or New York APR to advertisements is independent of the California and New York requirements to provide disclosure forms to each commercial borrower, not a method for complying with the disclosure-form requirements.

[58] Some commenters advocating preemption also invoked an additional hypothetical. As background, most consumer credit transactions above $66,400 (as inflation-adjusted annually) are exempt from TILA and Regulation Z, other than loans secured by real property, loans secured by personal property that is a principal dwelling, or private education loans. 87 FR 63671 (Oct. 20, 2022). The commenters argued that, if a State were to hypothetically require disclosures for consumer credit transactions above the $66,400 threshold, and also hypothetically were to require APR calculations that differ from Regulation Z's, it would be illogical to allow different APR disclosures depending on loan amount. However, the CFPB does not need to resolve whether there would be an inconsistency between that hypothetical State law and TILA, and it does not resolve that issue. The hypothesized scenario presents materially different issues to weigh compared to the California and New York laws, given that some consumers seeking credit primarily for personal, family, or household purposes might be unsure of what loan amount they want and so shop for credit above and below the $66,400 threshold. The California and New

C. Determinations

For these reasons, the Consumer Financial Protection Bureau determines that the California Commercial Financing Disclosures Law, Financial Code sections 22800 to 22805, is not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

The Consumer Financial Protection Bureau also determines that the New York Commercial Finance Disclosure Law, Financial Services Law sections 801 to 811, is not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

VI. Utah

A. Discussion

The Utah Commercial Financing Registration and Disclosure Act requires disclosures for certain commercial financing transactions, which do "not include a transaction from which the resulting proceeds are intended to be used for personal, family, or household purposes."[59] Consequently, it is not preempted for parallel reasons to California and New York. As an additional reason, because it does not require disclosure of a finance charge, APR, or other TILA-related disclosure, there would be no occasion for it to be preempted even if applicable to consumer credit transactions. The requesting party acknowledged in its comment that the Utah law is not preempted, and no other commenter provided reasons to support a determination that it is preempted.

B. Determination

For these reasons, the Consumer Financial Protection Bureau determines that the Utah Commercial Financing Registration and Disclosure Act, Utah Code sections 7-27-101 to 7-27-301, is not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

York disclosures would not be given to a consumer seeking credit primarily for personal, family, or household purposes of any amount.

[59] Utah Code secs. 7-27-101 to 7-27-301; *id.* sec. 7-27-101(4)(b). Besides disclosures, the statute also contains certain registration requirements that are plainly not preempted by TILA. *Id.* sec. 7-27-201.

VII. Virginia

A. Discussion

Chapter 22.1 of title 6.2 of the Code of Virginia requires disclosures in connection with sales-based financing to a recipient.[60] Based on the definition of "sales-based financing," which is tied to sales or revenue of the recipient, and the definition of "recipient," which must be "a person whose principal place of business is in the Commonwealth," it appears that the Virginia law would not apply to a consumer credit transaction as defined in TILA and Regulation Z.[61] To the extent it could apply to a consumer credit transaction, there would still be no basis to find an inconsistency with TILA. That is because the only TILA-related disclosure term used in the Virginia law is the finance charge, which the Virginia law's implementing regulation defines in precisely the same manner as Regulation Z.[62] Because there is no difference in the amount that would be included in the Virginia disclosure compared to TILA and Regulation Z disclosures, there is no occasion to consider whether a difference in amount would be inconsistent with TILA and Regulation Z.

The requesting party has made an argument that the Virginia law's finance charge disclosure is nevertheless preempted. However, this argument appears to rely on a misunderstanding of an aspect of TILA that is distinct from the Act's preemption standard. TILA section 111(a)(2), which neighbors the preemption provision in section 111(a)(1), authorizes the CFPB to determine that a State disclosure "is substantially the same in meaning as" a TILA disclosure.[63] After the CFPB makes such a substantially-the-same-in-meaning determination, TILA creditors can provide the CFPB-endorsed State disclosure "*in lieu of*" the TILA disclosure, except that the finance charge and APR must still be disclosed as provided by

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[60] Va. Code tit. 6.2, ch. 22.1; *see also* 10 Va. Admin. Code secs. 5-240-10 to 5-240-40.
[61] "Sales-based financing" is defined as a transaction that is repaid by the recipient to the provider, over time, as a percentage of sales or revenue, in which the payment amount may increase or decrease according to the volume of sales made or revenue received by the recipient. Va. Code sec. 6.2-2228. Sales-based financing also includes a true-up mechanism where the financing is repaid as a fixed payment but provides for a reconciliation process that adjusts the payment to an amount that is a percentage of sales or revenue. *Id.*
[62] 10 Va. Admin. Code sec. 5-240-10.
[63] 15 U.S.C. 1610(a)(2).

TILA.[64] However, the present proceeding involves a preemption determination, not a substantially-the-same-in-meaning determination.

The requesting party's comment appears to conflate section 111(a)(2) (or more specifically the Regulation Z provision and commentary implementing section 111(a)(2)[65]) with the distinct question under section 111(a)(1) of whether State disclosures are preempted as inconsistent with TILA. The commenter appears to read section 111(a)(2) to mean that any State disclosure with a finance charge or APR is preempted. In fact, all that it does is guarantee that, when CFPB-endorsed State disclosures are provided "in lieu of" the normal TILA disclosures in consumer credit transactions, those State disclosure forms will still include the TILA finance charge and APR, so that consumers can use them to shop among consumer credit options.[66]

B. Determination

For these reasons, the Consumer Financial Protection Bureau determines that chapter 22.1 of title 6.2 of the Code of Virginia is not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

Rohit Chopra,
Director, Consumer Financial Protection Bureau.

[FR Doc. 2023-06719 Filed: 3/30/2023 8:45 am; Publication Date: 3/31/2023]

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[64] *Id.*
[65] 12 CFR 1026.28(b); 12 CFR part 1026, supplement I, comment 28(b)-1.
[66] The comment may also intend for this argument to extend to California and New York; if so, it would not succeed with respect to those States for the same reasons.